No. 12,055

IN THE

United States Court of Appeals

For the Ninth Circuit

JAMES G. SMYTH, Collector of Internal Revenue of the First Internal Revenue Collection District of California,

Appellant,

vs.

CALIFORNIA STATE AUTOMOBILE ASSOCIATION, a corporation,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellee respectfully petitions the Court for a rehearing of the above-entitled cause in the light of the Court's opinion filed herein on June 22, 1949, based upon the following grounds:

1. That Article III of the By-laws of Appellee (hereinafter called the Association) relating to membership, as set forth in the opinion of the Court on pages 2 and 3 thereof, are the same as they were from

the date of the adoption of the first By-laws of the Association on September 14, 1907, to the present time, with the exception that Section 1 of Article III of the original By-laws contained the word "male" so that they read: "All male persons interested in the objects of this Association as hereinabove set forth shall be eligible to membership", and that the word "male" was deleted therefrom by an amendment adopted October 6, 1915, since which date there has been no change in said Section 1 or Section 2 of Article III of the Association's By-laws; that in spite of such provision as to membership, the Commissioner of Internal Revenue allowed exemption from income tax to the Association from 1913 to 1943.

If the Court deems it necessary to establish the facts with reference to the provisions of the Association's By-laws from 1907 to and including the year 1944 relating to Membership and Purposes and Powers, we respectfully request that the case be remanded to the trial Court for the purpose of receiving whatever testimony and documentary evidence may be necessary to establish such facts.

2. That the amendment of Article II of the Articles of Incorporation of the Association in 1929 was not considered by the Commissioner of Internal Revenue as a reason for denying further exemption to the Association beginning January 1, 1943, but that such exemption was denied for reasons which make no reference to the said amendment of Article II in 1929.

3. That the Association should not be deprived of its exemption from taxation, which existed for thirty

years from 1913 to 1943, for the reason that because of shortage of labor and materials and restrictions on use of automobiles during 1943 and 1944, it voluntarily devoted a portion of its resources and efforts to rendering patriotic services in furtherance of the war effort.

4. That the Association did not issue special memberships to hotels, garages and road service stations in 1943 or 1944, and as those were the only two years before the Court, it is respectfully urged that the issuance of such memberships in earlier years has no bearing upon and is not material in determining the tax exempt status of the Assocation for 1943 and 1944, the only years before the Court.

5. The Association further respectfully urges that in view of the fact that the Court's opinion of June 22, 1949, is based primarily upon issues not argued either on brief or orally before either this Court or the trial Court, the Association should now be granted the privilege of a rehearing so that it may have the opportunity of presenting authorities and arguments upon such issues.

ARGUMENT IN SUPPORT OF GROUNDS FOR REHEARING.

Grounds 1 and 2.

Grounds 1 and 2 will be discussed together in view of their close relationship. The first ground for reversal stated in the Court's opinion deals with its statement that the Association was organized to serve commercial as well as pleasure vehicles, and consider-

able stress is laid upon the amendment of Article II of the Articles of Incorporation of the Association in 1929, as set forth on page 2 of the Court's opinion.

There is a number of cases in which the form of organization of the corporation, the statutes under which it was organized, and powers outlined in the charter, have been held not decisive of the question as to whether it was actually "organized" for such purposes.

In *Koon Kreek Klub v. Thomas,* 108 Fed. (2d) 616, the Fifth Circuit Court of Appeals did not deny exemption under Section 101 (9) of the Internal Revenue Code, in spite of the fact that the club was authorized to raise livestock for profit. The Koon Kreek Klub was organized primarily as a fishing and hunting club maintaining a club house, boats, and fishing and game preserves for the pleasure and amusement of its members and it acquired a tract of land containing 6,777 acres, which completely surrounded a tract of 340 acres owned and occupied by one Thomas. It granted grazing privileges to Thomas for a consideration of $500 per year, and after oil was discovered about seven miles from the club property the club granted an oil lease on its entire property for $4 per acre, with renewal privileges, reserving the usual royalties. The club received from its lease an amount of $24,000 in 1934.

With respect to raising livestock for profit, which was clearly not in itself an activity relating to pleasure and recreation, the Court said:

> "The provision of the charter authorizing the club to engage in the business of raising live stock for profit, having been brought about by the prosecution of the original purpose of the club, and having been exercised to that end alone, does not change the character of the corporate entity from one clearly exempt, under the terms of the act, to one outside the exemption provisions. The express grant of authority must be construed in the light of the admitted purpose and operation of the club and its needs to accomplish its ends, and not abstractly to draw it within the terms of the statute, without regard to its purposes and intentions as a matter of fact. * * *"

In *Commissioner v. Battle Creek, Inc.,* 126 F. (2d) 405, the corporation was organized under the general corporation laws and was authorized to conduct "any lawful business". The corporation was not denied exemption simply because it was so organized. The Court said:

> "It is not unusual for charters or corporations to grant broad powers and privileges that are never intended to be used".

It is believed the Court will take judicial notice of the fact that many corporations are so organized.

In *Anderson Country Club v. Commissioner,* 2 T.C. 1238, exemption was allowed even though the Club was organized under the general corporation law, and also gave the specific power to, and expressed as one of its objects, the buying, selling and leasing of real estate, normally an activity conducted for profit.

In *Sands Springs Home,* 6 B.T.A. 198, the corporation was given extremely broad powers to conduct business and did, in fact, conduct a power, light and water company, a gas company, a greenhouse, a cotton gin, an amusement park operated for profit, and other businesses. It was, nevertheless, held tax exempt under Section 231 (6) of the Revenue Act of 1921, as a corporation "organized and operated exclusively" for charitable purposes, no part of the net earnings of which inured to the benefit of any private stockholders or individual.

In *Roche's Beach, Inc. v. Commissioner,* 96 F. (2d) 776, the corporation was organized under the general corporation laws and was authorized to do business. There were no restrictions on its use of income. It was, nevertheless, held exempt as a charity where all the proceeds were, in fact, turned over to an exempt charity. Evidence outside of the charter was admitted to show the purposes of its organization. The Bureau recognized the rule of the *Roche's Beach* case for some time, but then withdrew its recognition. However, the Tax Court in *Estate of Louise V. Simpson,* 2 T.C. 693, has specifically indicated that it still accepts the *Roche's Beach* rule in spite of the Bureau's rejection of it.

In *Unity School of Christianity v. Commissioner,* 4 B.T.A. 61 (acq.) the corporation was organized under the general corporation law and its purposes and authority were broad to enable it to engage in any business. It was, nevertheless, held exempt, the Board of Tax Appeals stating that a corporation otherwise

exempt from tax is not deprived of exemption because it carries on profitable or competitive activities in furtherance of its predominant religious, charitable, scientific, or educational purposes.

In *Goldsby King Memorial Hospital,* 3 T.C.M. 693, the Court did not refuse exemption where the articles were broad enough to encompass a profitable business and it was organized under the general corporation law. There was in this case, however, as in ours, a provision against any portion of the profits inuring to the benefit of a private individual.

In *I. T. 1914,* III-1, Cumulative Bulletin, Bureau of Internal Revenue, 287, a corporation was held exempt as a farmers cooperative under the 1918 Revenue Act even though its articles gave broad powers to engage in business for profit. It was ruled that the actual conduct governed rather than the stated purpose.

In *I. T. 2325,* V-2 C.B. 63, an agricultural fair association did not lose exemption because its certificate of incorporation gave it broad powers, since its actual activities were confined to exempt activities.

In *A.R.R.* 218, III C.B. 238, a teachers' insurance and annuity association whose purpose was to provide insurance and annuities to teachers on a *non-mutual, non-participating* basis was held exempt. The ruling said that under Solicitor's Opinion 20, the term "organized" as used in Section 231 (6) of the Revenue Act of 1918, refers to the real substance and intent of the organization and not to its mere form, the charter and by-laws merely giving rise to presump-

tions which may be affirmed or rebutted by extraneous evidence.

All of these cases and rulings stated for the principle that the expressed purpose is not necessarily determinative, and they are also indicative of the fact that it is not material that the type of business carried on is one usually conducted for profit, e.g., the operation of a bathing beach, insurance agencies or insurance company, raising of livestock, etc.

In its opinion, this Court also refers to the fact that at the time of the amendment of Article II of the Articles of Incorporation in 1929, many passenger cars were used by commercial agents in the course of their business and many more were used by persons going to and from their places of business, so that by 1943 and 1944 the Association's facilities were used to some extent for purposes other than pleasure and recreation. It is respectfully urged that this is not the criterion by which to decide the question of the Association's exemption under Section 101 (9) of the Internal Revenue Code, since the purpose of the Association is not to be determined by the use to which it is put by its members. It would be entirely erroneous, we believe, to deny tax exemption to a luncheon club or a golf club simply because some of the members of such clubs use the club facilities as a means of making and continuing business and professional contacts which are intended to and actually do serve the business and professional, rather than the pleasure and recreation, interests of such members. Such a practice is now and has been for many years so wide-

spread and so well known that it is believed the Court will take judicial notice of the practice. In fact, in some cases the making of business contacts or furthering business or professional interests is the sole or practically the sole reason for taking out such memberships, and in *Johnson v. United States,* 45 Fed. Supp. 377, decided by the District Court for the Southern Division of California, dues paid to two Country Clubs were held to be deductible as business expenses of two members who paid such dues for the purpose of obtaining business.

In addition, we believe that the Treasury Department was fully cognizant in 1929, when the amendment quoted by the Court was made to the Association's Articles of Incorporation, that passenger cars might be put to commercial use and were so being used. The Court has taken judicial notice of such fact and it would seem that the Treasury might also be charged with such notice. In any event, as will later be pointed out, it was the policy of the Government at that date to allow exemption of automobile clubs generally, in spite of the fact that obviously there must have been wide variations and occasional changes both in Articles of Incorporation and By-laws of such clubs.

In *O.D. 340,* I C.B. 202, an organization incorporated for the purpose of maintaining a day nursery for the children of working parents, and supported by donations, was held exempt. It would seem clear in this case that the parents were using the facilities to further their business interests and yet the nursery itself was not denied exemption.

In *I.T. 2296,* V-2 C.B. 65, a club whose object was encouragement of artistic handcraft work sold articles for its members and for *non-members* and charged a commission for the sale. It would seem clear that the club was participating in a business normally carried on for profit, and was being used by its members and outsiders as a means for accomplishing sales of their products. Such a use by the members and non-members did not defeat the club's exemption.

Similarly, in *S.M. 5516,* V-1 C.B. 81, an exchange incorporated for the purpose of giving employment to deserving women was held exempt. It was supported by donations and commissions on sales of handcraft articles. Clearly this organization was being used to further the commercial interests of its members.

In *Pasadena Methodist Foundation,* 2 T.C.M. 905, exemption was not refused a religious corporation even though it served as trustee of three trusts, administering them for the benefit of the donors who retained a life estate. The donor clearly was using the trustee's services to further its individual interests, and the individual's purpose did not defeat the exemption of the organization.

In a similar case, *Orton Ceramics Foundation v. Commissioner,* 9 T.C. 533, exemption was not refused a scientific foundation simply because it was operated partly for the purpose of providing a life annuity to the founder's widow.

Exhibit 1-D in the present case is the affidavit of D. E. Watkins, Secretary of the Association, executed

on October 5, 1941, which was prepared and forwarded to the Bureau of Internal Revenue at the request of the Collector of Internal Revenue at San Francisco in response to the latter's request dated September 10, 1941, Exhibit 1-C. One of the enclosures with Mr. Watkins' said affidavit forwarded to the said Collector by the Association in October, 1941, was Exhibit 1-B, which contains, *inter alia,* the amendment of Article II of the Articles of Incorporation of the Association adopted by the Board of Directors on August 8, 1929, and from which the Court quotes on page 2 of its opinion. The Commissioner of Internal Revenue consequently had before him on September 23, 1944, the date of his first letter denying further exemption to the Association, beginning January 1, 1943, the said amended Article II. In fact, in the second paragraph of the first page of said letter of September 23, 1944 (Exhibit 1-E), the Commissioner specifically refers to the provisions of that amended Article in the following language: "To furnish advice, information and assistance to owners and operators of self-propelled vehicles * * *". The Commissioner also took cognizance of the provisions of the Association's By-laws in the following language in paragraph 3 of the first page of the aforesaid letter, in which he states:

> "Your By-laws provide that all persons and associations similar to yours which are interested in the objects of your Association shall be eligible to membership * * *".

In spite of these facts, the Commissioner did not use either the quoted provisions of the By-laws or the

aforesaid amendment of Article II as a basis for his ruling denying tax exemption. Rather, the Commissioner predicated his ruling in large part upon the decision in *Arner v. Rogan* (May 20, 1940, C.C.H. par. 9567) and held that the organization there under consideration was not a club because there was no commingling of members or fellowship among members. The Commissioner further in the said letter stated that the Association's principal activity was that of rendering services to members of the type available to motorists generally on a commercial scale at greater cost. It is believed that the record completely refutes such assertion.

As the record further shows, the Association protested the aforesaid ruling of September 23, 1944, and upon reconsideration the Commissioner of Internal Revenue on July 27, 1945, sent a letter (Exhibit 1-G) to the Association and confirmed the adverse ruling of September 23, 1944, *supra,* stating that in G.C.M. 23688 (C.B. 1943, 283) it was concluded for the reasons therein stated that the M Automobile Association was not entitled to tax exemption under Section 101 (9) of the Code; that this opinion was first published during the first part of July, 1943, and in the light of the view expressed in G.C.M. 23688, it was concluded that the Association at bar was not entitled to tax exemption under Section 101 (9). We have heretofore commented at length in our brief in this Court upon the inapplicability of G.C.M. 23688 to our case.

In connection with the aforesaid letter of July 27, 1945, it is pertinent to note the statement by the Commissioner of Internal Revenue that "Prior to the time that the information submitted by you in 1941 was taken up for consideration a substantial number of automobile clubs had been held to be entitled to exemption under Section 101 (9) of the Internal Revenue Code and prior Revenue Acts".

At the trial of the present case in the District Court, the Government was represented by an assistant United States Attorney at San Francisco, who stated (Tr. 106-107) "In connection with the failure of the Commissioner to act promptly after 1941, I take it, is explained by the fact that *this action was a national action taken as to all similar clubs in 1943* and had not been taken as to any of them prior to that time. There is no difference between 1941 and 1943, as far as this club is concerned, or any other club in the United States. That followed G.C.M. 23668, which was issued in 1943. In other words, *it was a change at that time of the Department in reference to all clubs".* (Italics supplied.)

There seems to be no doubt that the action with reference to at least a large number of automobile clubs in the United States, denying them further exemption, was taken by the Commissioner of Internal Revenue in or about 1943, as part of a general policy, and that prior thereto tax exemption had been very generally accorded automobile clubs for many years. It is quite obvious that such clubs did not have identical articles of incorporation or by-laws, but that such

exemption had been very generally granted by the Commissioner of Internal Revenue over a long period of time without regard to specific provisions as to purposes and membership, which must have varied widely. In this connection it is quite significant that the Commissioner of Internal Revenue, even after receiving the general information contained in Mr. Watkins' affidavit of October 5, 1941 (Exhibit 1-D), including reference to the amendment of Article II of the Articles of Incorporation in 1929, and being advised also as to the qualifications for membership, both as outlined in the aforesaid letter of September 23, 1944 (Exhibit 1-E), did not base his adverse ruling upon either the aforesaid amendment of Article II of the Articles of Incorporation or of the provisions of the By-laws relating to membership.

The significance of the foregoing lies in the fact that exemption prior to 1943 had been given to automobile clubs, including ours, without regard to the lack of social features, and without limiting the operation of the statute in certain cases to strict pleasure and recreation purposes. (See Bureau rulings cited on pages 25 and 26 of our brief.) Instead, the Treasury Department had allowed such clubs exemption, obviously interpreting the words "and other nonprofitable purposes" to mean something different from strict pleasure and recreation. The exempting statute was repassed repeatedly while this interpretation was in effect. This is significant for two reasons—first, it indicates that the denial of exemption in our case was part of a general change in interpretation rather than

due to any act of the Association itself confirmed by the statement of Government Counsel in the trial Court hereinabove quoted (Tr. 106-107) that "this action was a national action taken as to all similar clubs in 1943" and that "it was a change at that time of the Department in reference to all clubs;" and, second, such changed administrative interpretation was improper because of the repeated reenactment of the exempting law.

In the Association's brief in this Court, we cited on page 33 the decision of this Court in *Bryant v. Commissioner,* 111 Fed. (2d) 9, in which the Court said:

> "The established administrative practice of so many years, during which time the exemption was several times reenacted, carries weight as a construction of the statute which is not offset, at least as to the tax year in question, by the later expression of opinion in G.C.M. 16861, XV-2 Cum. Bull. 179 (1936)".

The principle thus stated is well established. See also the decision of this Court in *Citizens National Trust & Savings Bank of Los Angeles v. United States,* 135 Fed. (2d) 527, on pages 33 and 34 of our brief.

The Supreme Court of the United States in *Helvering v. Bliss,* 293 U.S. 144, 79 L.Ed. 246, stated in connection with the right to a deduction on account of charitable contributions:

> "If the meaning of the Act were doubtful, we should still reach the same conclusion. The ex-

> emption of income devoted to charity and the reduction of the rate of tax on capital gains were liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and *are not to be narrowly construed.* * * * Moreover, from 1923 to 1932 the Commissioner uniformly ruled that the deduction for charitable contributions was to be taken from net income before computation of the tax and hence in whole from ordinary net income. *The reenactment in later Acts of the sections permitting the deduction indicates Congressional approval of this administrative interpretation.*" (Italics supplied.)

The Supreme Court of the United States again spoke on this question in *Helvering v. R. J. Reynolds Tobacco Co.,* 306 U.S. 110, 59 S.Ct. 423. In that case the Commissioner's regulations, in effect in 1929, provided that:

> "A corporation realizes no gain or loss from the purchase or sale of its own stock"

and they had so provided since 1920. The Court there said:

> "The administrative construction embodied in the regulation has, since at least 1920, been uniform with respect to each of the revenue acts from that of 1913 to that of 1932, as evidenced by Treasury rulings and regulations, and decisions of the Board of Tax Appeals. In the meantime successive revenue acts have reenacted, without alteration, the definition of gross income as it stood in the Acts of 1913, 1916, and 1918. Under the established rule Congress must be taken to have approved the administrative construction and thereby to have given it the force of law."

See also *Helvering v. Griffiths,* 318 U.S. 371, 63 S. Ct. 636.

As stated on page 10 of our brief, the exempting provision in question in our case has been enacted by Congress eleven times.

The record in this case shows (see pages 8-11, 31-33 of our brief in this Court) that there had been practically no change in the wording of what is now Section 101 (9) of the Code from 1916 down to the present, and that so far as the regulations issued under Section 101 (9) of the Code and similar sections under the prior Revenue Laws beginning with 1916 are concerned there had been no substantial change for a number of years except to more specifically define tax exempt clubs and to broaden the category of such clubs to include those meeting the description set forth in Regulations 111 (19.101 (9)): "Generally, an incidental sale of property will not deprive the club of the exemption".

Ground 3.

The Association feels strongly that its patriotic endeavors to furnish services in furtherance of the war effort to the extent of its abilities during the years before the Court, 1943 and 1944, should not be used as a means of depriving it of its prior thirty years of tax exemption, but that the rendition of such services should be treated as arising out of the emergencies of war, which we request the Court to judicially notice as not an event normally taken into consideration by legislative bodies in the enactment

of legislation during periods when the country is not engaged in war. The record in this case shows that the Association spent considerable time, money and effort in furthering the cause of the United States in the Second World War, and we believe its right to tax exemption should not be denied because of the absence of legislation specifically authorizing it to render such services, but that the situation existing in 1943 and 1944 should be treated as an emergency challenging citizens acting either individually or in corporate form to render such services as they could in support of their country's cause without being penalized for so doing.

In addition, we believe the Court's reasoning gives no effect to the words of Section 101 (9) "and other non-profitable purposes". It is, of course, a cardinal principle of construction that effect must be given, if possible, to every word and phrase in a statute. The phrase "pleasure and recreation" is clear and unambiguous, and it is difficult to conceive of additional "non-profitable purposes" so like pleasure and recreation as to require the application of the doctrine of *ejusdem generis*. On the contrary, we believe that "other non-profitable purposes" was clearly intended to enlarge the field of purposes which would still entitle a club to exemption, even though not found within the well understood meaning of "pleasure and recreation * * * purposes", and that the war services rendered by the Association should be held to fall within the category of "other non-profitable purposes". Otherwise it would seem that the Court's reasoning

could be used to defeat the exemption of every other type of non-profit or charitable corporation which engaged in volunteer war work.

Further, we do not believe the Association is properly subject to criticism for exercising its right to test administratively and in the Courts the legality of a tax imposition merely because certain war years are involved, and particularly where, as in the case at bar, the Association had been granted tax exemption as shown by the record for thirty years, from 1913 to 1943. In fact, it is a matter of common knowledge that the Bureau of Internal Revenue and the Courts as well have been considering, and will for a number of years to come, questions as to the legality of taxes imposed by the Commissioner of Internal Revenue during the period of the Second World War. As an illustration, Section 722 and other sections of the Internal Revenue Code were enacted expressly by Congress to afford relief under specified circumstances to taxpayers who paid large excess profits taxes during the war years, and where because such special circumstances existed Congress has said that such taxes should not have been imposed.

The Association must likewise respectfully dissent from the Court's conclusion, stated on pages 4 and 5 of its Opinion in this case, that, because of the Association's contention as stated, *any* association of automobile users, if not yielding a profit to its members, is a "club" within Section 101 (9), and that it would cover a non-profit association solely to serve commercial agents using automobiles in carrying on their

business in California, or to serve the hotels, garages and service stations actually served in prior years. We believe that such a result could not ensue for the reason that the provisions of Section 101 (9) with reference to pleasure and recreation might be ignored in such instances and, therefore, be ineligible for exemption under Section 101 (9).

Ground 4.

We believe that the point made by the Court in the first paragraph on page 6 of its Opinion has no application to this case, in view of the fact that special memberships to hotels, garages and service stations had been abandoned prior to 1943, so that such memberships were not issued and are not involved in the two years before the Court, 1943 and 1944. That fact, together with the elimination of other small amounts of income, was pointed out in the last paragraph on page 44 of the Association's brief reading as follows:

> "In that connection, it should be pointed out that certain activities which would result in the receipt of very small amounts of income had been abandoned prior to the year 1943. For example, the finance department, described on page 5 of Exhibit 1-D, was abandoned about February, 1942. The rental of a frame building used as a garage and located on appellee's San Francisco property was abandoned in October, 1941. The appellee had also abandoned, prior to 1943, special memberships to hotels, garages and road service stations from which a small amount of income had theretofore been received and all advertising revenue from the publication of the monthly magazine

> 'Motorland' had ceased late in 1941. Likewise, appellee had eliminated, prior to 1943, the very small amount of income received from sales of license plate frames."

Although we believe that the fact the Association had no such special memberships in 1943 and 1944 disposes of that issue, we feel the Court is in error in its statement that the Association's brief admits that such special memberships "contributed to its income for its services to them". The paragraph just above quoted, we respectfully submit, does not make such an admission. On the contrary, the Association intended to benefit its members and add to their pleasure and recreation by advising them of hotels, garages, etc., investigated and approved by the Association within the latter's territory, so that its members when traveling would have lists of such approved hotels, garages, etc., might know the class of service to be there obtained, their locations, rates, and comparative ratings, all of which would contribute to their satisfaction and comfort and eliminate worry as to where they might safely stay or obtain other needed services while on pleasure trips particularly. Nor do we agree that the income referred to by the Court was used for a service other than exclusively for the pleasure and recreation provided in the exemption. The income from such special memberships was placed in the general funds of the Association which, we contend, were used for services exclusively for the pleasure and recreation of the members.

The Court then distinguishes from the present case the cases of *Koon Kreek Klub v. Thomas,* 108 Fed. (2d) 616, and *Trinidad v. Sagrada Orden,* 263 U.S. 578. The latter case will serve to illustrate, we believe, that there is no difference between the cases cited and the case at bar on the point made by this Court that "Here prior to 1943 the income from all sources, including the hotels, garages and service stations, was used in part to serve their commercial purposes". As we interpret the Court's language its meaning is that the income from the special memberships in question was used together with income from other sources in part to increase the business and profits of the hotels, garages and service stations. That, of course, was not at all the purpose of the Association, as above stated, which was to perform a service to its members in furnishing them with lists of approved hotels, etc. If such purposes of the Association resulted in incidental profit to the hotels, garages and service stations, the same identical result occurred in the *Sagrada Orden* case where some of its income came from "* * * sums received, in excess of cost, for wine, chocolate, and other articles *purchased* and supplied for use in its churches, missions, parsonages, schools, and other subordinate agencies". Such purchases, while made for the benefit of the corporation and to further its purposes, had the effect of increasing the sales and consequent profits of the persons who sold such articles to the corporation.

As above set forth, however, we believe these special memberships should play no part in a determination

of the Association's tax-exempt status in 1943 and 1944, the only years before the Court, inasmuch as there were no such memberships in those years.

Ground 5.

We respectfully request the Court to grant this Petition for Rehearing upon the further ground that what appear to be the basic reasons for the Court's opinion were not argued either on brief or orally before the trial Court or this Court, so that we may have the opportunity of presenting authorities and arguments upon such issues.

Dated, San Francisco, California,
July 22, 1949.

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CERTIFICATE OF COUNSEL.

In the judgment of the undersigned Attorneys for Appellee, this Petition for Rehearing is well founded, and it is not interposed for delay.

Dated, San Francisco, California,
July 22, 1949.

Respectfully submitted,
ARTHUR H. DEIBERT,
GEORGE E. SANDFORD,
Attorneys for Appellee and Petitioner.